85-604 (1)

Supreme Court, U.S.
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Number of the Case_____

IN THE
SUPREME COURT OF THE UNITED STATES
Term 1985

DR. RICHARD A. SCARNATI

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

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59P

I

QUESTIONS PRESENTED FOR REVIEW

1. When a person is deprived of a statutorily conferred benefit such as due process, must due process analysis start, not with a judicial attempt to decide whether the statute has created an "entitlement" that can be defined as "liberty" or "property", but must it be with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake?

2. If a physician files suit against the Veterans Administration alleging that his discharge violated his Fifth Amendment Due Process rights, as well as applicable Veteran Administration regulations, may the deciding judge in his Memorandum Judgment acknowledge this fact without addressing all the applicable Veterans Administration regulations which may have been violated?

3. If both opposing parties in a proceeding agree to a stipulated fact, such as stating that one is to be considered a probationary employee, when in actual fact an error has been committed and the employee may have attained tenured status, is the "higher court" obligated to accept the error as fact, remand the case for further evidence, or accept the actual fact and make its decision based on the actual fact?

4. Is it acceptable judiciary form for a judge to make decisions regarding highly technical matter (medical specialty) which may be outside the scope of his expertise?

II

A LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

United States of America
(Veterans Administration)

III

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IV

REFERENCE OF THE OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

1. Summary Judgment entered by William W. Caldwell, U.S. District Judge of the U.S. District Court for the Middle District of Pennsylvania on January 3, 1985, in favor of defendant, United States of America, and against the plaintiff, Richard A. Scarnati, D.O. (Civil Action No. 84-0078).

2. Judgment Order by the United States Court of Appeals for the Third Circuit, No. 85-5060, on August 27, 1985, before: Adams, Garth, and Becker, Circuit Judges, adjudged and ordered that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

V

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Judgment of the United States Court of Appeals for the Third Circuit from which this appeal is taken is August 27, 1985. The time of its entry was July 24, 1985. No petition for rehearing was made. This Petition for Certiorari was filed within ninety (90) days of the date of the Judgment of the United States Court of Appeals for the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

VI

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

38 U.S.C. Section 4106 (a),(b).

(a) Appointments of physicians, dentists, podiatrists, optometrists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements.

(b) Such appointments as described in subsection (a) of this section shall be for a probationary period of two years and the record of each person serving under such appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations

of the Administrator, and if said board shall find him not fully qualified and satisfactory, he shall be separated from the service.

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. Section 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any

manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

21 C.F.R. Ch.II Section 1306.04(c)

(c) A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule for "detoxification treatment" or "maintenance treatment" as defined in Section 102 of the Act (21 U.S.C. 802).

VII

STATEMENT OF THE CASE

This action was instituted by Dr. Richard A. Scarnati against the defendant Veterans Administration (United States of America) alleging that his discharge violated his Fifth Amendment Due Process rights as well as applicable Veteran Administration regulations. The principal relief sought was reinstatement with back pay pending a hearing pursuant to constitutional requirements and Veteran Administration regulations.

This Petition for Certiorari seeks to upset the affirmance by the United States Court of Appeals for the Third Circuit of a final summary judgment granted in favor of the defendant, United States of America (Veterans Administration) (hereinafter referred to as Attorney Lied, Defendant's Representative). By Order and Memorandum dated January 3, 1985, the United States District Court for the Middle District of

Pennsylvania (Honorable William W. Caldwell, Judge), granted the motion for summary judgment filed on behalf of the United States (Appendix, pp. 1 to 24).

On April 15, 1985, Appellant Dr. Scarnati filed an appeal with the Clerk of the United States Court of Appeals for the Third Circuit. The time of its entry was July 24, 1985.

Circuit Judges Adams, Garth and Becker of the United States Court of Appeals for the Third Circuit on August 27, 1985, affirmed, adopting Judge Caldwell's opinion as their own. No petition for rehearing was made.

Petitioner, Dr. Richard A. Scarnati is a Board Certified Psychiatrist. He was hired by the Veterans Administration Medical Center, Lebanon, Pennsylvania, on September 26, 1982, and assigned as a staff psychiatrist at the Veterans Administration Outpatient Clinic in Harrisburg, Pennsyl-

vania. Before taking the position in Harrisburg, Pennsylvania, Dr. Scarnati had completed one year and one day of employment as a staff psychiatrist with the VA Medical Center in Hampton, Virginia. Dr. Scarnati was employed in the VA clinic in Harrisburg, Pennsylvania for one year and eighteen days. His total service as a VA staff psychiatrist is two years and nineteen days (Appellant's Reply Brief Appendix, p. 1).

Very early in his employment, Dr. Scarnati made an issue of the inappropriate and probably illegal prescribing practice in vogue in the past clinic practice.

When Dr. Scarnati refused to prescribe drugs that he considered dangerous for chronic use a few patients began complaining about him. It was the "opinion" of his superiors that Dr. Scarnati was making abrupt medication changes without appro-

priate follow up or input from the concerned patients and had poor interpersonal relationships with his patients.

In a letter to Dr. Scarnati dated February 1, 1983, from Dr. Feldberg, Chief of Staff, it was acknowledged that the former psychiatrist was a very giving individual who found it easier to go along with the demands of his patients than to set limits, and that all agreed that the prescribing practices in the clinic needed to be looked into (Appellee's Supplemental Appendix, pp. 80-81).

Dr. Scarnati did not agree with the contention of his superiors that he was too abruptly terminating medication without appropriate follow up or input from patients, conveyed his disagreement to them, and discontinued prescribing those drugs he considered to be dangerous for further use.

On June 22, 1983, Dr. Scarnati received a special proficiency report dated June 7,

1983, indicating an overall unsatisfactory rating. Dr. Scarnati was notified June 23, 1983 that his performance would be reviewed by a Professional Standards Board to determine whether his continued employment was warranted, and that the Board would consider two charges only.

The Professional Standards Board was made up of three members: An internist, a surgeon, and a radiologist.

At the July 19, 1983 meeting of the Professional Standards Board, Dr. Scarnati was told that the "Board's time was limited and...to address the two main issues" the Board was considering (Appellee's Supplemental Appendix, p. 74).

Also at the meeting the Board reviewed twelve written exhibits. Dr. Scarnati did not receive copies of the twelve exhibits nor become aware of their content until October 7, 1983. At that time he concluded that he had never seen three of the twelve

exhibits. Three exhibits did not contain responses of the VA Medical Center Administrator to complaints made against Dr. Scarnati that he alleges contain approving statements concerning his reasons for terminating medication.

A memo dated December 17, 1982, and alleged by Dr. Scarnati to be approbative of his performance was not presented to the Professional Standards Board.

On August 4, 1983, the Professional Standards Board determined that Dr. Scarnati's clinical competence was at an unsatisfactory level due to his inability to establish and maintain productive doctor-patient relationships and his failure to follow the instructions of his supervisors and recommended that he be terminated.

The action recommended by the local Board was approved by Dr. Donald L. Custis, Chief Medical Director of the Veterans

Administration on September 30, 1983, and Dr. Scarnati was terminated on October 13, 1983.

For the purposes of this action, Dr. Scarnati was to be considered a probationary physician with his appointment and tenure with the Veterans Administration to be governed by 38 U.S.C. Section 4106.

In the Honorable U.S. District Judge William W. Caldwell Memorandum dated January 3, 1985, Judge Caldwell noted that plaintiff was considered a probationary physician and was subject to the provisions of 38 U.S.C. Section 4106, and that Section 4106(b) of the statute specifies that the probationary period is two years in duration.

Judge Caldwell assumed that the alleged "abrupt" medication changes charged by defendants against Dr. Scarnati was an established fact. He also felt that Dr. Scarnati was refusing to prescribe

medication that some patients had been using with "apparent success over long periods of time."

Judge Caldwell acknowledged that there were just two issues that the Professional Standards Board was considering.

The "Liberty Interest" issue seemed to be the main thrust of Judge Caldwell's evaluation. He concluded that a liberty interest was not infringed and that no due process hearing was required.

In discussing Stretten v. Wadsworth Veterans Hospital, 537 F. 2d 361 (9th Cir. 1976), part of the statement by the court that Judge Caldwell quoted and Dr. Scarnati noted was:

> That the constitutional need for procedural protection is not strong when the charge (e.g. incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge (underlined emphasis by Petitioner) are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession.

The Judge noted that a label which would prevent an individual from practicing his chosen profession at all may have consequences so severe that liberty would be infringed, and that such a formulation raises the possibility that in some cases due process rights will turn on a definition of the scope of a particular profession, and that in this case both parties appear to have assumed that the relevant profession is "physicians."

Judge Caldwell noted that Dr. Scarnati had argued that he could show that the charges against him have interfered with his finding work as a physician. The Judge seemed to imply that the facts belie Dr. Scarnati's contentions.

Judge Caldwell did note that Dr. Scarnati had not had full time work as a psychiatrist since his dismissal from the VA except when he worked for two months in the summer of 1984 at the Harrisburg

Institute of Psychiatry.

Regarding the exhibits that were available to the Professional Standards Board, Judge Caldwell felt that Dr. Scarnati was not entitled to copies of all materials that were reviewed by the Board, and that "any error in failing to provide them would appear harmless." He also felt that the "favorable" memorandum of December 17, 1982 had no relevance to the case. The July memorandum, he felt, was somewhat vague.

Review of the judgment of a federal court is sought, the basis for federal jurisdiction of the U.S. District Court for the Middle District of Pennsylvania is based upon Title 28 U.S.C. Section 1291.

The original jurisdiction of the U.S. District Court was based on Title 28 U.S.C. Sections 1331 and 1346.

VIII

REASONS FOR GRANTING THE WRIT

Dr. Scarnati does feel that the District Court did err when it determined that the Veterans Administration's termination of him did not violate due process of law for all of the following reasons presented.

Attorny Lied notes (Appellee's Brief, p. 16) that pursuant to statutory authorization, the VA has promulgated certain policies and procedures for the conduct of Board reviews of probationary employees. These procedures are contained in VA Manual MP-5, Part II, Chapter 4-DM&S (Appellee's Supplemental Appendix, pp. 60-67). Appellant received similar papers from VA Personnel. Appellant's Exhibit 4 (Appellant's Reply Brief, pp. 5-6) is a Reference Slip from Personnel regarding attached excerpts concerning probationary period and Board reviews. Page 62 of Appellee's Supple-

mental Appendix deals with Chapter 4. Probationary Period. Appellant's Exhibit 4 is Chapter 4. Probationary Period and Appellant will refer to Exhibit 4 because it is an official copy from VA Personnel and is different from Appellee's Supplemental Appendix, page 62. According to Appellant's Exhibit 4, appellant shall have his record reviewed in a fair and impartial manner by a Professional Standards Board.

On Page 64 of Appellee's Supplemental Appendix, under 4.06 Procedure for Board Reviews, it states that in conducting reviews, the Professional Standards Board will have access to the entire employment record of the employee, including proficiency ratings, counseling reports and evaluations by supervisory personnel. The Board will carefully consider all aspects of the employee's service. And on page 65 of Appellee's Supplemental Appendix it states the Board...is to obtain all the

facts bearing upon his adjustment and performance in order to arrive at a sound recommendation.

Dr. Scarnati feels the Professional Standards Board acted in a very unfair and impartial manner. He had never seen several of the exhibits that the Board relied on for their judgment; other exhibits were incomplete and did not contain responses of the VA Medical Center Administrator to complaints made against him that he feels contain approbative statements concerning his reasons for terminating medication. A memo from the Chief of Psychiatry to Dr. Scarnati (Appellee's Supplemental Appendix, p. 95) which contains approbative statements: "I feel you are doing a fine job. Keep up the good work" was not given to the Professional Standards Board.

Judge Caldwell does acknowledge that the July memorandum given to the Board was somewhat vague. And yet, Judge Caldwell

also noted that Professional Standards Board notice must be in sufficient detail so that the employee will clearly understand why his services are considered deficient and/or the nature of the incident involved. To this day Appellant still does not know what the specific issues are in that case.

Attorney Lied noted: "It is respectfully submitted that the fact that Dr. Scarnati was not given a copy of each document which the Board reviewed and which may have been adverse to him, did not violate his right to due process since he had no right to confront or cross-examine any adverse witnesses (Appellee's Brief,p.20). This seems to contradict the above statement that Judge Caldwell made regarding the employee's need to know the material in sufficient detail so that one would understand why his services are considered deficient and/or the nature of the incident

involved.

Concerning minutes of the Professional Standards Board (Appellee's Supplemental Appendix, p. 74), the Chairman of the Board stated that the Board's time was limited and instructed Appellant to address the two main issues of Dr. Holtzman's Memorandum.

In this regard a remark by Justice Marshall is worth considering: "How often do we have to reiterate that the Due Process Clause 'recognizes higher values than speed and efficiency'?" Wolf v. McDonnell, (1974), 418 U.S. at p. 583, 94 S. Ct. at p. 2988.

The Board "forced" Appellant to "stick" to the two main issues that the Board wished to address. Appellant was not permitted to address all of the untrue statements in Appellant's Proficiency Report (Appellee's Supplemental Appendix, pp. 68-69).

The Board, according to their standard,

should have carefully considered all aspects of Dr. Scarnati's service. They did not do this, and because of this Dr. Scarnati feels they were unable to make a sound recommendation.

Part of the stipulated record stated that in the "opinion" of his superiors, the thrust of the complaints were that Dr. Scarnati was making abrupt medication changes on some patients.

Attorney Lied (Appellee's Brief, p. 29) stated that the record in this case demonstrates that Appellant's problems with his supervisors came about because of a difference of opinion and that the reasons for removing Appellant were solely performance related...a difference of opinion.

If this Honorable Court agrees with Attorney Lied regarding a difference of opinion, then Appellant would like to refer to the Lebanon, Pa. VA Medical Center Standard (Appellant's Exhibit 5) (Appel-

lant's Reply Brief, pp. 7-9) regarding Disciplinary Actions, Title 38 Employees. Appellant notes Exhibit 5 states: Disciplinary action will not be taken...in cases of difference of professional opinion. It appears that based on this standard that the Veteran's Administration has acted in an unfair and partial manner toward Appellant by taking disciplinary action (termination) against Appellant when according to their own standard they should not have done so. It appears that Appellant has a legal right to his opinion as to the proper treatment of his patient, for in Christy v. Saliterman, 179 N.W. 2d 288 (Minn. 1970), that court said that in a field of specialization such as psychiatry in which different courses of treatment may properly and reasonably be applied, a doctor has the right to use his best judgment concerning the manner and means of treatment and the procedures he will follow.

Appointments of physicians under the provisions of 38 U.S.C. Section 4106(b) one notes that appointment is in accordance with regulations of the Administrator, and if said board shall find him not fully qualified and satisfactory, he shall be separated from the service. If Dr. Scarnati was appointed in accordance with "regulations" of the Administrator, then why did the Board, knowing their regulations regarding "opinion", terminate him?

In the event of "a case in which there is a failure to conform to procedural requirements set forth in its (the hospital's) constitution by-laws or rules and regulations," the "extent of judicial review is to require compliance with the prescribed procedure." Shulman v. Washington Hosp. Center, 222 F. Supp. 59, 63, aff'd, 348 F. 2d 70 (D.C. Cir. 1963). Dr. Scarnati prays this Honorable Court will also require the VA to comply with

their prescribed procedure.

Regarding Dr. Scarnati's so-called "Probationary" status. According to the VA Employee Service Statement of Dr. Scarnati, Appellant's Exhibit 1 (Appellant's Reply Brief, pp. 1-2), service performed in this agency (Veterans Administration) was two years and nineteen days. Appellant's Exhibit 2 (Appellant's Reply Brief, p. 3) is a copy of a letter, dated 9-23-82, from Leonard Washington, Jr., Medical Center Director, stating, "Your appointment is subject to a probationary period of two years." Please note (Appellee's Supplemental Appendix, p. 71) that Dr. Custis, Chief Medical Director of the VA did not approve of Appellant's termination until 9-30-83. This would have occurred after Appellant's two-year probationary period. It appears that Appellant was terminated nineteen days after his probationary period of two years when he then should have been considered a

tenured employee.

It appears that the stipulated record is in error for even 38 U.S.C. Section 4106(b) states: Appointments shall be for a probationary period of two years.

Dr. Scarnati feels that Judge Caldwell made decisions regarding medical specialty practice erroneously because it was beyond the scope of his expertise. He addressed the question of alleged "abrupt" medication changes as an established fact. This is in error because there is no established standard in psychiatry in regards to "abrupt". He felt that Dr. Scarnati was refusing to prescribe medication that some patients had been using with "apparent success over long periods of time." A letter from the Lebanon VA Medical Director dated March 7, 1983 to the Honorable Bill Goodling (Appellee's Supplemental Appendix, p. 92) does not support this contention because two other psychiatrists supported

Dr. Scarnati's view. Judge Caldwell rightly noted that in some cases due process rights will turn on a definition of the scope of a particular profession, but he erroneously felt that both parties assumed the relevant profession is "physicians". This is not the case. Dr. Scarnati is a Board Certified Psychiatrist. Board Certified Psychiatrists are generally held to be "experts" in their profession. They are held to a much higher standard of accountability than that of "physicians." The Professional Standard Board's radiologist, internist and surgeon are not able to determine the proper practice of a psychiatrist as they are not Dr. Scarnati's professional peers.

Dr. Scarnati does believe that Judge Caldwell was in error when he felt Dr. Scarnati's Fifth Amendment Due Process rights were not violated for the following reasons: The charges against Dr. Scarnati

did interfere with his employment. He was unemployed for a very long period of time. In quoting the Stretten case, the Honorable Judge appeared to have accepted the court's finding that the results of even a "false charge" are really of no consequence. Dr. Scarnati finds this frightful and prays that this Honorable Court does not concur with this concept.

Judge Caldwell also noted that in line with provisions of 38 U.S.C. Section 4106(b) that the employee appear before the Professional Standards Board and make an oral or written statement in his own behalf. Dr. Scarnati was never permitted to give his oral statement; he was "forced" to stick to the two issues that the Professional Standards Board wanted to address. The Judge stated that any error in failing to provide them (the exhibits Dr. Scarnati never saw) would appear harmless. In reality Dr. Scarnati was harmed, he was

terminated from his position.

The Supreme Court itself has stated that: "The touchstone of due process is protection of the individual against arbitrary action of government (Citations)." Wolf v. McDonnell (1974) 418 U.S. at p. 558, 94 S.Ct. at p. 2976.

Dr. Scarnati believes that in view of 21 C.F.R. Ch. II Section 1306.04(c) the past prescribing of the synthetic narcotic Darvon to drug dependent patients was an illegal practice by the VA.

Dr. Scarnati feels the Writ of Certiorari should be granted because the federal court of appeals sanctioned the departure of the District Court from acceptable judicial proceedings for all the reason stated above in this Writ.

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By Dr. Richard A. Scarnati
Dr. Richard A. Scarnati
Diplomate of the
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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. SCARNATI, D.O. Plaintiff	:	
vs.	:	CIVIL ACTION NO. 84-0078
LEONARD WASHINGTON, JR.; JANARDAN P. SINHA, M.D.; MURRAY FELDBERG, M.D.; SAUL C. HOLTZMAN, M.D. ; HARRY WALTERS, and UNITED STATES OF AMERICA; Defendants	:	

ORDER

AND NOW, this 3rd day of January, 1985, IT IS ORDERED THAT:

1. Defendant's motion for summary judgment is granted.

2. The Clerk of Court shall close the file.

-S-
William W. Caldwell
United States District Judge

Date: January 3, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD A. SCARNATI, D.O. Plaintiff	:	
vs.	:	CIVIL ACTION NO. 84-0078
LEONARD WASHINGTON, JR.; JANARDAN P. SINHA, M.D.; MURRAY FELDBERG, M.D.; SAUL C. HOLTZMAN, M.D. ; HARRY WALTERS, and UNITED STATES OF AMERICA; Defendants	:	

M E M O R A N D U M

I. Introduction

Before the court is the motion of defendants for summary judgment in the above-captioned matter. The motion now applies only to the United States, the sole remaining defendant pursuant to a stipulation of the parties which was approved on December 13, 1984, and provided that all other defendants be voluntarily dismissed from this case pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

The summary judgment motion is opposed

by plaintiff, and the parties have agreed to a set of facts that constitutes the evidence in this case. The parties acknowledge that we have before us all relevant materials needed to decide the summary judgment motion. For the reasons discussed hereinafter we have concluded that defendant's motion should be granted.

II. Background

The plaintiff, Dr. Richard A. Scarnati, initiated this action under 28 U.S.C. Sections 1331 and 1346, contending that he was denied due process in the proceedings that led to his termination as a staff psychiatrist with the Veterans Administration. At the times relevant to the present complaint (September 26, 1982 to October 7, 1983), plaintiff was considered a probationary physician and was subject to the provisions of 38 U.S.C. Section 4106. Section 4106(b) of the statute specifies that the probationary period is two years in duration and

that the records of probationary physicians are subject to periodic board review. Moreover, if the board concludes that the doctor is "not fully qualified and satisfactory he shall be separated from the service." Id.

After his appointment to the VA Medical Center in Lebanon, Pennsylvania, plaintiff, a doctor of osteopathy and a psychiatrist, began working in a satellite outpatient clinic in Harrisburg. By January of 1983, complaints from patients and other individuals were being received by VA officials about plaintiff's ability to establish affirmative relationships with patients and about his treatment methods, particularly his refusal to prescribe medications that some patients had been using with apparent success over long periods of time.

The abrupt changes made by plaintiff in the medications received by his patients

stemmed from his view that the use of certain drugs was dangerous except on a short term basis. Following discussions with his superiors about the complaints, plaintiff received a special proficiency report that gave him an unsatisfactory rating. He was also notified that a three-member Professional Standards Board (PSB) would be convened to determine whether plaintiff would have his employment continued or terminated.

At the initial PSB meeting on July 12, 1983, no deliberations occurred nor was testimony heard or exhibits received. On July 19, however, twelve written exhibits were submitted and testimony was received from the plaintiff and from three of his supervisors. Plaintiff addressed the two issues the PSB was considering: The propriety of his medication procedures and his relationship with patients. At plaintiff's request another session of the

PSB was held on August 4, 1983, so that he could further present his case.

On that date, at the conclusion of the proceedings, the PSB recommended plaintiff's termination and concluded that Dr. Scarnati's clinical competence was unsatisfactory "due to h s inability to establish and maintain productive doctor-patient relationships and his failure to follow the instructions of his supervisors. Upon further review by a central office board of the VA, the recommendation of the PSB was approved and Dr. Scarnati was notified that he would be terminated at the close of business on October 13, 1983.

On January 18, 1984, the complaint in the present action was filed alleging that plaintiff's discharge violated his Fifth Amendment Due Process rights as well as applicable VA regulations. The principal relief sought was reinstatement with back pay pending a hearing pursuant to constitu-

tional requirements and VA regulations.

III. The "Liberty Interest" Issue

Disposition of the current motion turns on the common issue characterizing similar cases where due process violations are alleged, i.e. whether a "property" or "liberty" interest in employment is involved. As numerous cases have held, absent such an interest, plaintiff cannot assert a due process claim under the constitution. See, e.g., Orloff v. Cleland, 708 F.2d 372 (9th Cir. 1983). The United States Supreme Court, in the landmark case of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), concluded that an individual does not have a property interest in a governmental benefit, including employment, unless he has entitlement to the benefit. In the present case, it is undisputed that plaintiff was a probationary physician and therefore had no property interest in

continued employment as a VA staff psychiatrist. Thus, his due process claim is dependent upon whether his problems with the VA infringed a constitutionally protected liberty interest.

Formulating a precise definition of what constitutes a liberty interest is difficult. In Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir. 1976), the court stated,

> The "liberty interest" is the interest an individual has in being free to move about, live, and practice his profession without the burden of an unjustified label of infamy. Board of Regents v. Roth, 408 U.S. at 572, 92 S.Ct. at 2706, 33 L.Ed.2d at 557. In the context of Roth-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions outside of professional life. Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy.[13] The distinction is not perfect; our utility affects our dignity and worth whether viewed from within or without.

However, implicit in such a distinction is the notion that the constitutional need for procedural protection is not strong when the charge (e.g., incompetence) involves a matter which is peculiarly within the scope of employer-employee relations and when the likely results of even a false charge are reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession. Employers, including the Veterans Administration, have a strong interest in conserving resources and dealing expeditiously with incompetent employees.

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[13] But a Label which would prevent an individual from practicing his chosen profession at all may have consequences so severe that liberty would be infringed. Such a formulation raises the possibility that in some cases due process rights will turn on a definition of the scope of a particular profession. In this case, both parties appear to have assumed that the relevant profession is "physicians."

Id. at 366.

Stretten, a case heavily relied upon by defendant, bears discussion. The plaintiff, a physician who was employed as a resident in pathology at a VA hospital, was terminated prior to completing his first year of residency essentially for unsatis-

factory performance of his duties. The appellate court in Stretten concluded that the district court had erred in finding that a liberty interest was infringed by the doctor's dismissal and found instead that the record below did not support a contention that such an interest had "in any way been infringed." Id. Moreover, the court observed,

> All the charges which surround his termination center around his inability to perform satisfactorily as a pathology resident, including an unwillingness or inability to deal with his coworkers in a professional manner. These are not the kind of charges which are likely to preclude Dr. Stretten from practicing medicine, and in fact there is evidence in the record that the charges may not have precluded him from staying in his specialty of pathology [footnote omitted]. Thus we find no infringement of liberty and hence no deprivation of due process on that account. [Footnote omitted.]

Id.

In the present case, plaintiff has argued that his situation is distinguishable from that of the physician in Stretten

because he can show that the charges against him have interfered with his employment and will continue to hinder his finding work as a physician. The stipulations of fact filed in this matter, however, belie plaintiff's contentions. The stipulations indicate that all VA installations receive a list of "some former employees of the VA whose employment is terminated" (emphasis supplied). The central office of the VA must be contacted before such individuals may be hired. Dr. Scarnati has provided a lengthy list of prospective employers to whom he made application from October 13, 1983, through September 26, 1984. Whether or not plaintiff's name has been circulated to VA installations is unclear but at any rate it appears that plaintiff has not applied for employment at such facilities. Under the circumstances, we cannot conclude that plaintiff is precluded from all future

positions with the VA.

In addition, although the stipulations indicate that other federal agencies may receive copies of plaintiff's personnel file if they so request, the record is unclear on whether any federal agency has made such a request. It is undisputed, however, that of the 124 prospective employers on plaintiff's list only one contacted the VA concerning his employment history. Thus, although plaintiff may feel compelled to consent to disclosure of his VA personnel folder to possible employers who request the information, such requests to date have been minimal. By his own admission, Dr. Scarnati has voluntarily disclosed the circumstances of his discharge not only to the potential employers but also to the general public, largely through the news media.

Plaintiff's effort to publicize his discharge are significant in the context of

the form of action he has brought. In Orloff, supra, the United States Court of Appeals for the Ninth Circuit reversed the lower court's grant of summary judgment for defendants because of deficiencies in the record, among which were "whether the VA publicized the reasons for Orloff's discharge." 708 F.2d at 378. As the court noted,

> [W]hen the government dismisses an individual for reasons that might seriously damage his standing in the community, he may be entitled to notice and a hearing. Board of Regents v. Roth, 408 U.S. at 573 n. 12, 92 S.Ct. at 2707 n. 12. The accusations, however, must be publicized. See Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), cert. denied, 455 U.S. 948, 102 S. Ct. 1449, 71 L.Ed.2d 662 (1982). Moreover, the accuracy of the charges must be contested. Vanelli v. Reynolds School District No. 7, 667 F.2d 773, 777 (9th Cir. 1982).

Id. The court in Bollow, supra, citing among other cases, Bishop v. Wood, 426 U.S. 341, [illegible] 96 S. Ct. 2074, 2079, 48 L.Ed.2d 684 (1975), found that "[u]npublicized accusations do not infringe constitu-

tional liberty interests because, by definition, they cannot harm °good name, reputation, honor, or integrity'" 650 F.2d at 1201.

No evidence exists in the present case that the publicity generated about plaintiff's dismissal originated with the VA. Thus, the charges aginst plaintiff would not have been publicized, with the possible exception of information circulated to VA installations, but for Dr. Scarnati's efforts to focus media attention on his problems with the VA. Under the circumstances we must conclude that all publicity that could negatively influence plaintiff's status in the job market was generated by plaintiff. The focus of the relevant cases, such as Bollow, supra, and Orloff, supra, is on whether adverse publicity originated with the employer. The VA in the present matter played no role in providing information to the media regard-

ing Dr. Scarnati's discharge.

The stipulations of fact further reveal that although Dr. Scarnati has not had full time work as a psychiatrist since his dismissal, he worked for two months in the summer of 1984 for the Harrisburg Institute of Psychiatry. A glowing letter from his supervisor at this Institute has been submitted for our consideration. Such a reference should facilitate plaintiff's finding future employment as a psychiatrist.

Unlike the plaintiff in Orloff, who was charged with assigning VA doctors to perform services for a private medical corporation and with working privately in other locations during hours when he was credited with being on duty at a VA installation, Dr. Scarnati was not charged with dishonesty or immorality or other actions rising to the "moral turpitude" standard discussed in Stretten, supra.

Rather he was terminated because he could not establish productive relationships with his patients and did not follow directions from his supervisors, particularly with regard to abrupt medication changes for his patients.

We have carefully considered the case of Giordano v. Roudebush, 448 F. Supp. 899 (S.D. Iowa 1977) (hereinafter Giordano I) relied upon by Dr. Scarnati. In Giordano I a liberty interest was found to have been infringed when a probationary urologist was dismissed. A major concern of the Giordano I court was that Dr. Giordano was deprived of a hearing with "some measure of procedural protections." Id. at 904. In the present case, we have concluded that a liberty interest was not infringed and that no due process hearing was required. Nevertheless, for the sake of clarification, we shall examine the due process issue and in doing so, distinguish the

present matter from Giordano I.

IV. Due Process Considerations

Plaintiff's due process attack focuses on the exhibits considered by the PSB. First, Dr. Scarnati contends that he had never seen three of the twelve exhibits presented to the PSB on July 19, 1983, until he received copies of all the exhibits in October, 1983. The three exhibits in question addressed patient complaints about Dr. Scarnati with regard to abrupt medication changes and/or poor rapport with patients.(1) Plaintiff has further contended that three other exhibits were incomplete because they were complaints about him to which one of his superiors responded. Plaintiff contends that the responses, which were not submitted for consideration by the PSB, approved plaintiff's actions and thus were erroneously and prejudicially omitted.(2) The final contention regarding exhibits is that

a memorandum dated December 17, 1982, to plaintiff from his direct supervisor was not submitted to the PSB. That document addressed the results of an audit of the records of fifteen outpatients, asked that Dr. Scarnati "note the deficiencies," and concluded with "I know you have corrected most of these and I feel you are doing a fine job. Keep up the good work."

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(1) The first two were memoranda dated March 16 and March 17, 1983, and were written by the assistant chief of the psychiatry service, one of plaintiff's supervisors. The third, dated July 6, 1983, was from a VA team leader to the chief of the psychiatry service.

(2) The exhibits consisted of letters dated January 28 and February 23, 1983, and a memorandum dated June 19, 1983. The February correspondence came from a woman with a personal care home for veterans and detailed medication changes and the results thereof for several of Dr. Scarnati's patients.

Plaintiff, as a probationary employee, clearly was governed by the provisions of 38 U.S.C. Section 4106 rather than 38 U.S.C. Section 4110, which applies only to

tenured employees. Two cases that have comprehensively discussed the differences between the process that is due employees pursuant to the aforementioned statutory provisions are Kenneth v. Schmoll, 482 F.2d 90 (10th Cir. 1973) and Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980) (hereinafter Giordano II). In Kenneth, a case in which the appellate court reversed the district court's order that a probationary VA nurse be reinstated pending a full evidentiary hearing, the court concluded,

> [T]he VA views the probationary period as being an extension of the appointment process, which provides the final test of actual performance on the job and which is designed to protect the VA against the retention of individuals who are found in actual practice to be unsuited for permanent employment. In any event, there is most certainly no language in Section 4106(b) which suggests to us that a probationary employee is entitled to a full-blown, trial-like hearing, with the right to counsel, right to confront adverse witnesses and cross-examine, before he be "separated from the service." On the contrary, we believe the exact opposite is indicated.

> In line with the provisions of Section 4106(b), the regulations promulgated by the Administrator to effectuate this particular legislative intent sets up a review board known as the Professional Standards Board, which is authorized, among other things, to conduct a so-called summary review "when summary separation from the service may be justified." Under these regulations, notice is required, which notice is to be "brief, but in sufficient detail so that the employee will clearly understand why his services are considered deficient and/or the nature of the incident involved," with the subject of the hearing permitted to thereafter appear before the Professional Standards Board and make an oral or written statement in his own behalf, through not being permitted to confront and cross-examine witnesses or be represented by counsel.

Id. at 93-94. Although nurse Kenneth had alleged but not presented to the trial court a constitutional right to a full scale hearing, the appellate court "in the interest of bringing the matter to speedy conclusion" ordered that no hearing be held on "whether a preliminary injunction could be based on any constitutional ground." Id. at 95.

In Giordano II, the court in discussing

the same statutory provisions and their separate and distinct applicability to probationary and tenured medical employees, noted that plaintiff urologist upon rehearing had received a 2-1 retention vote by the PSB convened in his case. The heart of Giordano I, however, in contrast to the present case, was the court's observation that plaintiff would have had no right to a constitutional due process hearing except to give him the opportunity to refute and/or explain the stigmatizing statements in his record. 448 F.Supp. at 899.

In the present case, plaintiff, unlike Dr. Giordano, appeared before the PSB twice and had ample notice of the charges being considered, as well as the opportunity to counter them. Insofar as the exhibits are concerned, we agree with defendant's position that plaintiff was not entitled to copies of all materials reviewed by the PSB. Even assuming arguendo that

Dr. Scarnati could demonstrate a right to these exhibits, any error in failing to provide them would appear harmless. The favorable memorandum of December 17, 1982, has no relevance to the proceedings initiated later on the specific problems before the PSB. The letters of March 7 and June 23, 1983, do not contain blanket approvals of Dr. Scarnati's methods. Finally, the exhibits dated March 16, March 17, and July 6, 1983, either reiterate complaints of which plaintiff was aware through other sources or, in the case of the July memorandum, is somewhat vague so that any rebuttal would of necessity be equally general.

V. Conclusion

In conclusion, even were a liberty interest implicated in the present case, and we have determined it was not, plaintiff was accorded more than ample opportunity to answer and refute the charges

against him. Based upon the discussion above, the defendant's motion for summary judgment will be granted in an accompanying order.

-S-
William W. Caldwell
United States District Judge

Date: January 3, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5060

RICHARD A. SCARNATI, D.O.,
Appellant

v.

LEONARD WASHINGTON, JR.; JANARDAN P. SINHA, M.D.; MURRAY FELDBERG, M.D.; SAUL C. HOLTZMAN, M.D.; HARRY WALTERS, and UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Middle District of Pennsylvania
(C.A. No. 84-0078)
(Honorable William W. Caldwell)

Submitted Under Third Circuit Rule 12(6)
July 24, 1985

Before: ADAMS, GARTH and BECKER, Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

-S-
Circuit Judge

ATTEST:

Dated: Aug. 27, 1985

-S-
Sally Mrvos, Clerk

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-604

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD A. SCARNATI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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RICHARD A. SCARNATI, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his termination as a Veterans Administration (VA) staff psychiatrist. Following review by a Professional Standards Board (PSB), petitioner's employment was terminated because of "his inability to establish and maintain productive doctor-patient relationships and his failure to follow the instructions of his supervisors" (Pet. App. 6).

1. On September 26, 1982, petitioner was appointed as a physician by the VA and assigned as a staff psychiatrist to the VA Outpatient Clinic in Harrisburg, Pennsylvania (Pet. App. 3-4). According to petitioner, early in his employment at the Clinic, he began refusing to prescribe various drugs that he considered dangerous for chronic use (Pet. 13). Petitioner apparently concedes that he did so despite contrary instructions from his superiors (see *id.* at 14). By January 1983, VA officials were receiving complaints from

patients and other individuals concerning his abrupt medication changes and poor relationships with patients (Pet. App. 4). On June 22, 1983, petitioner received a special proficiency report that gave him an unsatisfactory rating. He was also notified that a three-member PSB would meet to determine whether his employment would be continued or terminated (*id.* at 5).

When the PSB met on July 19, 1983, it reviewed 12 exhibits and heard testimony from petitioner and three of his supervisors. Petitioner addressed the two issues being considered by the PSB: the propriety of his medication procedures and his relationship with patients. At petitioner's request, another meeting was held on August 4, 1983, so that he could further present his case. At the end of the August 4 meeting, the PSB concluded that petitioner's clinical competence was unsatisfactory and recommended termination (Pet. App. 5-6). Following review by a central office board of the VA, the recommendation was approved, and petitioner was notified that his employment would be terminated as of October 13, 1983 (*id.* at 6).

Petitioner brought this action in the United States District Court for the Middle District of Pennsylvania, seeking reinstatement and back pay. The parties stipulated that "[f]or purposes of this action, [petitioner] is to be considered a probationary physician with his appointment and tenure * * * to be governed by 38 U.S.C. § 4106." C.A. Supp. App. 20 (Stip. ¶ 1); see also *id.* at 25 (Stip. ¶ 29). The district court granted the government's motion for summary judgment, holding that petitioner's discharge complied with due process and the VA's statute and regulations (Pet. App. 1-23). The court of appeals affirmed without opinion (*id.* at 24). Petitioner advised the court of appeals by letter dated March 6, 1985, that he began full-time employment as a prison psychiatrist for the Department of Mental Health in Cincinnati, Ohio (Appellee's Br. 13 n.7).

2. The court of appeals' summary affirmance of the district court's fact-bound decision is correct, does not conflict with any decision of this Court or other courts of appeals, and presents no issue warranting this Court's review.

a. Petitioner's principal assertion is that he should be relieved of the stipulation that he was a probationary employee under 38 U.S.C. 4106. It is well settled, however, that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances. See *H. Hackfeld & Co.* v. *United States,* 197 U.S. 442, 446-447 (1905). Even at the trial level, orders and stipulations are not to be set aside except to avoid manifest injustice. See Fed. R. Civ. P. 16(e). Petitioner has not identified any such injustice here, or explained why he should not be bound by the stipulation he entered into on advice of counsel.

Moreover, petitioner raised this issue for the first time in his reply brief in the court of appeals, so that neither court below addressed the issue. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States,* 274 U.S. 195, 200 (1927) (citations omitted); see also, *e.g., Kosak* v. *United States,* No. 82-618 (Mar. 21, 1984), slip op. 2 n.3; *United States* v. *Lovasco,* 431 U.S. 783, 788-789 n.7 (1977); *Tennessee* v. *Dunlap,* 426 U.S. 312, 314 n.2 (1976).[1]

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[1]Petitioner asserts only that it "appears" he "may have" had nonprobationary status (Pet. 29, 2), and relies only on an employee service statement which includes time in service that does not count toward his probationary period. Petitioner's claim that he was entitled to nonprobationary status because of length of service was expressly rejected elsewhere, in *In re Arbitration Between VA Medical Center & American Federation of Government Employees, Local 1966,* FMCS No. 84K/02649 (Apr. 16, 1984) (Florey, Arb.); petitioner's exception to this ruling was dismissed by the Federal Labor Relations Authority, No. O-AR-771 (Dec. 13, 1984).

b. Petitioner contends (Pet. 21-25) that the VA violated due process and its regulations because he was not given certain documents reviewed by the PSB and because the PSB was not provided certain supposedly "approbative statements" (Pet. 23). As a probationary employee, however, petitioner had no property interest sufficient to implicate due process protections. See *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). Nor was any liberty interest infringed. The circumstances of his termination were not the sort to damage seriously his standing and associations in the community. The fact that petitioner has acquired full-time employment in his field demonstrates this; so does the fact that petitioner himself publicized the circumstances of his termination (Pet. App. 12-16). See *Roth*, 408 U.S. at 572-575.

Given petitioner's probationary status, the district court was also clearly correct that he was afforded proper treatment under the VA's own regulations (Pet. App. 17-22). Whether or not petitioner had every document submitted to the PSB, he had "ample notice of the charges being considered" (*id.* at 21; see also *id.* at 22); conversely, petitioner's documents, which he contends the PSB should have considered but did not, were irrelevant, or fell greatly short of being "blanket approvals of [petitioner's] methods," or both (see *id.* at 22).[2] Even assuming arguendo that not submitting these documents was erroneous, petitioner has failed to show why the error was not harmless.

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[2]Petitioner's claim (Pet. 26-29) that he was terminated, contrary to VA regulations, because of a "difference of professional opinion" assumes that termination is inappropriate even when the difference of professional opinion leads to insubordination. This, of course, cannot be the case. Petitioner was fired because of his insubordination and inability to get along with his patients (Pet. App. 6), not because of his opinions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12